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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1201

Fred G. Hayden, d/b/a Houston International Airport Limousine Service,

Petitioner

v.

A. G. Bowen, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Fred G. Hayden prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 26, 1968.

OPINIONS BELOW

The District Court rendered a memorandum opinion, unreported (R. 400-414), and the opinion of the Court of Appeals is reported at 404 F.2d 682. The opinions of the District Court and the Court of Appeals are set out in the Appendix, pp. 1, 11.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1968. Petitioner's timely filed Petition for Rehearing was overruled by order entered on

December 26, 1968. Petitioner's Motion for a Stay of Mandate until March 26, 1969 was granted on January 2, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

Under authority of two successive unexclusive franchises granted to him by the City of Houston to use the streets of the city "to transport persons, with their personal luggage, from the Houston International Airport [owned by and located within the City] to points within the City of Houston, and from such points within the City of Houston to such airport", Petitioner engaged in the business of transporting passengers and their luggage in eleven passenger limousines to and from the Airport and such points. During the years relevant to this suit, Petitioner transported the following percentages of the total arriving and departing Airport passengers: 1961 - 15.83%; 1962 - 13.88%; 1963 - 13.19%; 1964 - 9.33%; and 1965 - 10.72%. No airline had any control over Petitioner's fares, schedules, routes or policies, and he had no arrangement with anyone for prepaid or prebooked fares. Respondents were employed by Petitioner in the operation of this business. The questions presented are:

1. Whether any Respondent employed as a driver, starter, checker, or dispatcher in the business of transporting persons from the Airport to points within the city and from such points to the Airport was engaged in "commerce" as defined in 29 U.S.C. §203.

2. Whether the following findings of the Court of Appeals are clearly erroneous: The Houston International Airport is located near the southern boundary of the city; transportation to and from the Airport was provided primarily by taxicabs, limousines and private automobiles; no public transit system served the Airport; Petitioner's franchise directed that the limousines be used exclusively to provide public airport ground transportation services; the limousine service worked hand-in-glove with airlines; and when a flight schedule was changed, notice of the change was sent to the limousine office.

3. Whether the finding of the District Court, affirmed by the Court of Appeals, that Petitioner did not have an agreement with all Respondents, except Respondents Bowen, Brown and Gray, that tips were a part of their wages, is clearly erroneous.

STATUTES INVOLVED

The statutes involved are set forth below:

> "As used in this Act --
>
> * * *
>
> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any States and any place outside thereof." 29 U.S.C. 203; 52 Stat. 1060.
>
> "Every employer shall pay to each of his employees who in any

workweek is engaged in commerce or in the production of goods for commerce wages at the following rates --

(1) Not less than .... an hour ...." 29 U.S.C. 206(a); 52 Stat. 1060. 1/

"Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; . . ." 29 U.S.C. 207(a); 52 Stat. 1060

STATEMENT OF THE CASE

This is an action, in which Federal jurisdiction is based on 29 U.S.C. §1337, for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201-219, brought by Respondents who were

1 $1.00 per hour through September 2, 1961; $1.15 per hour from September 3, 1961, through September 2, 1963; and $1.25 per hour from September 3, 1963. 29 U.S.C., §206.

formerly employed by Petitioner in the performance of two successive unexclusive franchises granted to him by the City of Houston to use the streets of the city "to transport persons, with their personal luggage, from the Houston International Airport to points within the City of Houston, and from points within the City of Houston to such airport (R. 377, Pl. Ex. No. 1, Def. Ex. No. 1).

During the period from June 21, 1961 to February, 1965 (herein called "relevant period") Respondents were employed at various times by Petitioner as drivers, starters, checkers or dispatchers. The hourly wage rate paid directly by Petitioner was: driver - $1.00; checker - $1.10; starter 0 $1.44; and dispatcher - $1.44. Petitioner did not compensate an employee for overtime at a rate of one and one-half his regular hourly rate (R. 34, 35).

The City of Houston (herein called "City") owned and operated the Houston International Airport (herein called "Airport") which was located within the City, not near, but approximately four miles from its southern limits (R. 421, Def. Ex. No. 7, R. 292). Petitioner engaged in the business of transporting persons and their luggage in motor vehicles, commonly known as airport limousines, from various points in the city to the Airport and from the Airport to various points in the city. Petitioner engaged in this business under authority of two ordinances enacted by the City Council of the City (the first expired

and the second began on June 8, 1962) granting him an unexclusive "franchise to transport persons, with their personal luggage, from the Houston International Airport to points within the City and from points within the City to such Airport (R. 16, 247, 421, Def.Ex. No. 1, Pl. Ex. No. 1). Both franchise ordinances prescribed the fares to be charged; regulated the service to be performed, the motor vehicles to be used, the subject of routes and schedules for pickup and delivery of passengers; required Petitioner to pay a gross receipts' charge, to maintain insurance, to maintain certain records; and provided grounds for forfeiture of the franchise (Def.Ex. 1 and Pl. Ex. 1). The 1962 ordinance prescribed fares of $.75 for airline personnel and children under 12 years of age and $1.50 for all other passengers (R. 429).

Both ordinances completely regulated the operation of the airport limousine service, and the City was the sole authority regulating Petitioner's business. No airline, by contract or otherwise, had any control over Petitioner's schedules, routes, fares, or policies. Fares were paid directly to Petitioner by passengers, no fares were collected by airlines, and except for fares of airline personnel, none were paid by airlines. Transportation was contracted for by passengers independently of the air journey, and coupons for transportation could not be obtained through airlines or other sources. Petitioner was not obligated, by contract or otherwise, to perform any service for any airline. (R. 329-331)

Both ordinances found that it was not practical to prescribe detailed schedules or routes or to require Petitioner to operate over an established line. Both ordinances required Petitioner to provide limousines, with not less than a seven-passenger capacity, in a sufficient number to provide ground transportation twenty-four hours a day, seven days a week, for all incoming and outgoing flights at the Airport. From 1957 through June, 1962, Petitioner used seven-passenger Cadillacs and from that time used a "Checker", a motor vehicle with four doors on each side, a passenger capacity of eleven, and space for luggage at the rear (R. 267-268). Petitioner operated twenty or twenty-two vehicles during the relevant period (R. 267).

Under the first ordinance, Petitioner designated pickup and delivery points within the City, but under the second ordinance the City Aviation Director designated such points. On June 15, 1963, some thirty-eight points, including hotels, office buildings, shopping centers, etc., had been designated (R. 276, Def. Ex. 4).

To comply with the scheduling requirement of the City, Petitioner did not work hand-in-glove with airlines, but prepared limousine schedules from the Official Airline Guide, a private publication issued twice a month, showing the schedules of all airlines. Petitioner scheduled the departure of his limousines from the Airport and from pickup points in the City to coordinate with the arrival and

departure times of flights of all scheduled airlines, attempting to allow twenty to twenty-five minutes for driving time from the last pickup point to the Airport, and to pick up passengers for different airlines on the same trip. Airlines did not send flight schedule changes to Petitioner. (R. 328, 329, 244)

Petitioner suggested routes for drivers to follow between the Airport and pickup areas, and from pickup areas to the Airport, but drivers had authority to deviate from the routes and were permitted to let a passenger off along a suggested route (R. 17, 18, 50). In picking up or delivering passengers, limousines would not stop at a pickup point unless there was a passenger for such point (R. 77).

The layout of the Airport is shown on Defendant's Exhibit No. 3 (R. 259-261). The entrance to the terminal building is on the second floor, to which a ramp, divided into two lanes, for motor vehicles, was provided. The inner was for commercial vehicles and the outer for private vehicles. A similar drive is provided on the ground floor. The upper ramp was used for discharging passengers and the lower ramp for picking up passengers (R. 261-265, 285).

An employee of Petitioner, called a starter, was stationed on the lower ramp to assist passengers to take limousines to delivery areas (R. 262-267). At his place of business near the downtown district Petitioner kept a dispatcher. Persons desiring transportation to the

Airport from pickup points could call the dispatcher for reservations and reservations could be called to a dispatcher by the various airlines (R. 265-275). Drivers of limousines at the place of business and those completing a delivery of passengers from the Airport were instructed by the dispatcher as to pickup points where there were passengers desiring transportation. A limousine delivering passengers to the Airport would discharge them on the upper ramp, and then get in line to await his turn to pick up passengers on the lower ramp (R. 263, 264).

Petitioner's limousines transported airline passengers, airline personnel and other patrons of the airport. Normally airline personnel rode limousines in the same manner as other passengers, but by special arrangement and not by contract, at various times during the relevant period, Petitioner provided a separate (not reserved) limousine for personnel (not just crews) of three airlines for a flat fee. The service was available to any person at the Airport or a pickup point (R. 257-259).

The franchise did not require the limousines to be used exclusively to serve the Airport, but permitted Petitioner to use the limousines for other purposes with "prior approval by the City Council" (R. 428), and limousines were available and used for charter service, such as sightseeing tours, weddings, movement from hotel to hotel, and for special groups visiting the City (R. 255).

A person desiring transportation to or from the Airport had a choice of a multi-

tude of modes of conveyance. In fact, during the relevant years, Petitioner transported only the following percentages of the total arriving and departing passengers: 1961 - 15.83%; 1962 - 13.88%; 1963 0 13.19%; 1964 - 9.33%; and 1965 - 10.72% (R. 277-279; Pl. Exs. 6 and 7).

Twelve hundred parking spaces were provided for private automobiles on the Airport grounds and spaces were provided on the upper ramp and lower for private automobiles to discharge and pick up passengers, respectively (R. 284, 285).

The 1962 franchise provided that the privilege granted should not "mean that such passengers or patrons of the Airport cannot use taxicabs or other public transportation services available for conveyance to and from the Airport"(R. 424). The City prescribed a rate for taxicabs at $.45 for the first two-thirds of a mile and $.10 for each additional one-third of a mile for one to four passengers (R. 106, 107). The fare of three or four passengers riding in a taxicab would be less than the limousine fare. The City provided approximately thirty-two spaces for taxicabs at the Airport, most of the time the spaces for taxicabs were filled and taxicab service was always available (R. 80, 280, 282).

Transportation to and from the Airport was also available by charter service from two public transit systems operating within the City (R. 252, Def. Ex. 2). The evidence is inconclusive on whether the Airport was served by a public transit

system, but Petitioner had seen buses of Pioneer, a rapid transit system, in the terminal grounds (R. 351, 352). A large majority of the motels and hotels in Houston provided a bus or limousine service by which passengers were delivered to and picked up from the Airport (R. 287, 288), and several rental car agencies, including Hertz, National and Budget, had automobiles for rent at the Airport (R. 286-288).

Other limousine services were available for charter service. One had a fleet of ten vehicles, the Shamrock Hotel had two, and Executive Service had four vehicles. The Galveston Limousine Service was provided with two loading spaces on the lower ramp and provided transportation to the City of Galveston (R. 290-293).

Petitioner and the witnesses Hall, Edge and Wood testified that Petitioner had an understanding with each driver that his salary would be $1.00 per hour plus tips (R. 239, 336, 340, 232, 233, 225-230). Bowen, Brown and Gray were the only respondents who testified, and they denied that they had such an agreement with Petitioner (R. 45, 89, 148). There is no testimony that Petitioner did not have such an understanding with the remaining Respondents.

After trial to the court, without a jury, the District Court entered judgment awarding a specific sum of money to each Respondent (aggregating $19,913.10) and the sum of $4,500.00 as attorney's fees (R. 417). The Court of Appeals affirmed

the judgment of the trial court, and Petitioner's timely filed Petition for Rehearing was overruled on December 26, 1968.

REASONS FOR GRANTING THE WRIT

I

The Public Importance of the Issue Presented

In practically every city of the nation served by a commercial airline, the Secretary of Labor and the operator of a limousine service or bus line transporting passengers to and from an airport face the question of whether the employees of such an operator are engaged in "commerce" within the meaning of the Fair Labor Standards Act. The public importance of the issue here compelled the Secretary of Labor to advise the Court of Appeals:

> "The Secretary of Labor submits this brief as amicus curiae because the case presents issues of substantial importance to the general enforcement of the Fair Labor Standards Act (Act of June 25, 1938 c. 676, 52 Stat. 1060, as amended; 29 U.S.C. 201, et seq)." Amicus Curiae Brief, pp. 1.

The importance of the issues to the innumerable operators of airport buses and limousines who cannot determine from reported decisions whether or not their employees are covered by the Act is no less substantial. The court below decided

an important question of federal law which has not been, but should be settled by this Court.

Although United States v. Yellow Cab Co., 332 U.S. 218 (1947), decided the principles controlling this case, this Court has not decided the precise question presented. The decision of the Court of Appeals in the instant case conflicts with Mateo v. Auto Rental Co., 249 F.2d 831 (C.A. 9, 1957), and Cederblade v. Parmelee Transp. Co., 94 F.Supp. 975 (N.D. Ill. 1947) affirmed, 166 F.2d 554 (C.A. 7, 1948). The Secretary of Labor criticizes Mateo as being "erroneously decided" and Cederblade as making "an erroneous interpretation of the 'local taxicab' ruling" in Yellow Cab Co., Amicus Curiae Brief, pp. 12.

The decision below also conflicts with the principles applied in Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (C.A. 7, 1963, cert. den., 377 U.S. 943) and the principles recognized in Southerland v. St. Croix Taxicab Association, 315 F.2d 364, 369 (C.A. 3, 1963). The decision below is not similar to and is not in conflict with, Airlines Transp. v. Tobin, 198 F.2d 249 (C.A. 4, 1952). The reliance on Tobin, however, adds to the confusion created by the conflict between the Fifth Circuit and the Ninth and Seventh Circuits.

With these conflicts unresolved by a decision of this Court on the precise question, it is impossible for the Secretary of Labor to enforce the Fair Labor

Standards Act uniformly in all of the circuits. It is equally impossible for the hundres of operators of airport buses or limousine services in all the circuits to determine whether their employees are engaged in commerce. This Petition should be granted to authoritatively settle "issues of substantial importance to the general enforcement of the Fair Labor Standards Act."

II

The Decision Below Conflicts in Principle With Decisions of This Court

The decision below squarely conflicts with the principles announced in United States v. Yellow Cab Co., 332 U.S. 218 (1947). Applying the principle that interstate commerce is an intensely practical concept drawn from the normal and accepted course of business, Yellow Cab Co. rejected the contention that taxicabs transporting passengers to and from Chicago railroad stations were engaged in commerce. This Court held that the common understanding is that a traveler begins his interstate movement when he boards the train at the station and ends such journey when he disembarks at the station in the city of destination and that what happens prior or subsequent to the rail journey, "in the absence of some special arrangement, is not a constituent part of the interstate movement." In essence, the holding is that the common understanding of the beginning and end of an interstate journey is not to be discarded unless the relationship of the

interstate traveler, individually or through his carrier, to the local carrier alters the beginning and end of the journey.

The factors Yellow Cab Co. states to be relevant to the relationship between the interstate traveler and the local carrier are identical with those between Petitioner and the interstate air traveler. Petitioner has no contractual arrangement with air carriers, and his fares are not paid or collected as a part of airline fares. His service is contracted for independently of the air journey, and his service is but one of many that may be used because the air traveler has complete freedom to arrive at or leave the Airport by many means of transportation. Also, Petitioner's service, by ordinance, is confined to points within the City.

The decision below is not based on these factors or the common understanding of the beginning and end of an interstate journey. Respondents were held to be engaged in commerce because "air travel, predominantly interstate, into and out of the Houston International Airport was the very lifeblood of the limousine service" and because, in the opinion of the Court, regulation by a municipal corporation to effect efficient service by airport limousines is the same as complete contractual control of the fares, schedules and arrangement for the carriage of passengers by an airline.

Considering the small percentage of the total arriving and departing passen-

gers transported by Petitioner, it is manifest that the first basis of the holding below is premised on what happened "prior or subsequent to the" air journey, although there were no special arrangements for transportation between the interstate traveler and Petitioner. In the absence of such special arrangement, Yellow Cab dictates that the common understanding of the beginning and end of an interstate journey is at the Airport.

Under Yellow Cab Co., when Jones from New York deplanes and walks into the terminal building in Houston, what happens subsequent to his air journey, "in the absence of some special arrangement, is not a constituent part of the interstate movement." Under the holding of the court below, the end of the interstate journey is marked by the decision Jones makes in the terminal building. If he decides to ride in a limousine, his interstate journey continues. If he decides to ride in a taxicab or other mode of conveyance, his decision terminates the interstate journey. Later, as Jones sits in his hotel room, undecided on the transportation to take to the Airport, his decision to ride a limousine or a taxicab determines when his interstate journey begins. The example emphasizes the conflict of the holding below with the principles of Yellow Cab Co.

The decision below also conflicts in principle with Pennsylvania R. Co. v. Knight, 192 U.S. 21 (1903). Instead of

applying the "practical considerations" determining the beginning and the end of an interstate air journey, the court below relied on facts distinguishing Petitioner's limousines from a taxicab and the fact that "with few exceptions, the exclusive source" of Petitioner's patronage was interstate air travel. In Knight, the railroad company maintained a cab service for the sole purpose of transporting railroad passengers exclusively between its ferry station and their residences and hotels. This service was held to be an independent local service, preliminary or subsequent to the interstate journey. Yellow Cab Co. observed that Knight "does illustrate the normal and accepted concept of the outer limits of this type of interstate journey."

Inasmuch as the taxicabs transported railroad passengers exclusively, under the decision below that Petitioner's operation was an integral part of the interstate journey because the essential nature of his business was the transportation of airline passengers, the service in Knight was interstate, not intrastate.

The conclusion is inescapable that the decision below conflicts with the principles of Yellow Cab Co. and Knight.

III

The Decision Below Conflicts With Decision of Other Courts of Appeals

The decision in the instant case squarely conflicts with Mateo v. Auto

Rental Company, 240 F.2d 831 (C.A. 9, 1957) and Cederblade v. Parmelee Transp. Co., 94 F.Supp. 965 (N.D. Ill. 1947, affirmed, 166 F.2d 554 (C.A. 7, 1948)), the principles applied in Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (C.A. 7, 1963,cert. den. 377 U.S. 943), and principles recognized in Southerland v. St. Croix Taxicab Association, 315 F.2d 364 (C.A. 3, 1963).

Mateo held that employees of Auto Rental who were engaged principally in transporting airline and steamship passengers to and from the Honolulu Airport or the Port of Honolulu and the downtown and Waikiki districts, were not in commerce. The activities of Auto Rental were more closely related to interstate commerce than those of Petitioner. Fifty percent of Auto Rental's passengers from incoming air travelers were prepaid or prebooked by purchase of coupons from travel agents or various airlines. Auto Rental transported credit passengers whose fare was charged to individual travel agents, and it executed contracts with various airlines to transport crew members on a per car charge basis. Petitioner has no arrangement for prepayment of fares or transporting credit passengers. All fares are paid in cash by the passenger. Petitioner has not contracted with any airline to transport its crews, but arrangements could be made for transportation of airline personnel in a separate limousine.

In other respects the activities of Auto Rental and Petitioner are similar.

Auto Rental used and Petitioner uses an eleven passenger limousine to transport airline passengers, airline personnel, and other patrons of the Airport. Auto Rental "occasionally drove the airporters on sight-seeing tour trips". Petitioner uses the limousines for charter services. Auto Rental's dispatcher, like Petitioner, endeavored to coordinate the airporters' schedules with airline flights. No airline exercised any control over the schedules, fares or policy of Auto Rental, and none exercises such control over Petitioner.

Auto Rental "was engaged in a stiff competitive battle with other airporter systems and taxicab companies". Petitioner, operating under an unexclusive franchise, engaged in competition so stiff that the percentage of the number of arriving and departing airline passengers transported by him declined from 15.83% in 1961 to 10.72% in 1965.

The dissimilarities in the facts in Mateo and the facts here noted in the decision below are immaterial. Petitioner operates under "the strictures of a franchise", but it is inconceivable that Auto Rental did not operate under a license or certificate. Mateo points out that the fares of Auto Rental were fixed upon the advice of local authorities and that a certain contract was not recognized by the Hawaii Aeronautics Commission. Mateo does not state that Auto Rental determined its own pickup and delivery points; the opinion only states that passengers were dropped at individual destinations so long as the place was on or

near the main route. Petitioner discharges passengers at points along his suggested routes

The opinion does not show that Auto Rental was obligated by governmental authority to coordinate its activities with flight schedules, but states that "the dispatchers endeavored to coordinate airporter schedules with the early morning and early evening transocean flights." Theopinion does not state that Auto Rental was free to use its limousines for purposes unrelated to airport transportation, but reflects that it "occasionally drove the airporters on sightseeing tour trips." With City Council approval, Petitioner could and did use limousines for sightseeing trips and other charter services.

The court below was not obliged to follow Mateo, but it cannot be distinguished on the grounds stated. The primary foundation of the holding below is that interstate air travelers were the principal source of Petitioner's business. All of Auto Rental's passengers were trans-ocean passengers.

Applying the distinction made in Yellow Cab Co., Cederblade, supra, held that the transportation of passengers by Parmelee, under contract with railroads, between railroad stations in Chicago, was a constituent part of the interstate movement, but that its operation of airport buses transporting passengers and baggage in both directions between downtown Chicago and the Municipal Airport

was not "a part of the stream of interstate commerce" and the employees of Parmelee in the latter activity were not "within the scope of the Fair Labor Standards Act."

In attempting to distinguish Yellow Cab Co., the court below gave controlling weight to the facts that the taxicabs did not serve railroad passengers exclusively and were required to serve every person within the city. Yellow Cab does state that transportation of persons in taxicabs from Chicago railroad stations was intermingled with local operations, and that a taxicab did not limit its service to railroad passengers, but was required to serve every person in Chicago. As Cederblade points out, however, these statements were made to distinguish taxicab operations from Parmelee's interstation transfer of passengers and not to distinguish a taxicab operation from a railroad or airport limousine service. Cederblade gave weight to the facts that the taxicab companies had no contractual or other arrangement with the interstate railroads, their fares were not paid or collected as a part of the railroad fares and the traveler had complete freedom to arrive at or leave the railroad station by any of a number of means of local transportation. Weight was given to these facts to show that nothing happened prior or subsequent to the air journey to alter the common understanding of the beginning and end of such journey. The controlling factors in Cederblade are present here, but the court below refused to apply them.

Following Yellow Cab Co., Evanston Cab Co., supra, held that certain taxicab companies which had been, in effect, granted an exclusive right to transport passengers to and from the O'Hare Airport by the city refusing to permit other taxicabs to render taxi service there, except when specially contracted for prior to rendering such service, were not in commerce. Quoting from Yellow Cab Co., the court gave weight to the common understanding of the beginning and end of an interstate journey, to the fact that in the absence of special arrangement what happens prior or subsequent to an air journey is not part of the interstate movement, to the freedom of the traveler to leave the airport by other forms of transportation, and to the fact that service by the taxicab was contracted for independently of the air journey.

In holding that passengers transported from an airport by a tour agency under contract with the passenger's employer were in the stream of commerce from the time they left their homes until they returned home again, Southerland, supra, applying a factor from Yellow Cab Co., points out "This is not a situation where the transportation from the airport to the hotel was local haulage in the sense that the traveler's interstate journey had ended at the airport at which point he could independently contract for his transportation to his hotel by conveyance of his own choice."

The opinion below cannot be squared

with the holdings in Mateo and Cederblade, the principles applied in Evanston Cab Co., or the principle recognized in Southerland. The common understanding of the beginning and end of an interstate air journey also applies to the instant case because there was no special arrangement between Petitioner and interstate travelers ("what happens prior or subsequent" to the air journey) altering the beginning or end of their journey.

CONCLUSION

To confirm the factors underlying the holding in Yellow Cab Co., to protect the common understanding of the beginning and end of an interstate journey, to resolve the conflict between the decision below and the contrary decisions of the Ninth and Seventh Circuits and the contrary view of the Fourth Circuit, and to guarantee uniform enforcement of and compliance with the Fair Labor Standards Act throughout the nation, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned counsel for Petitioner Fred G. Hayden, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing petition has been served upon Respondents by the undersigned personally delivering a copy thereof to Mr. George C. Dixie, Attorney of Record for Respondents, at his office at 505 Scanlan Building, Houston, Texas 77002, on this, the ____ day of March, 1969.

Raymond M. Hill

Counsel for Petitioner

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25836

FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE,

Appellant,

versus

A. G. BOWEN, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(November 26, 1968)

Before GEWIN, PHILLIPS* and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge: The appellees, former employees of Houston International Limousine Service, brought this action in the United States District Court for the Southern District of Texas to recover unpaid minimum wages and overtime compensation under

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*Judge Harry Phillips of the Sixth Circuit, sitting by designation.

the Fair Labor Standards Act of 1938 as amended.[1] The primary question presented is whether the appellees were engaged in "commerce" within the meaning of the Act. The district court answered this question in the affirmative and ruled against the limousine service on its subsidiary contentions. We affirm.

Houston International Airport, located within the city near its southern boundary, is approximately eleven miles from downtown Houston. During the period relevant to this suit transportation between the airport and points within the city was provided primarily by taxicabs, limousines, and private automobiles. With the exception of chartered buses on a few occasions, no public transit system served the airport. Houston International Limousine Service, owned by appellant Hayden, operated out of the airport under a franchise granted by the city of Houston, which owns and operates the airport. The franchise permitted Hayden to transport persons from the airport to hotels, offices, and apartment buildings within the city and from these points to the airport.[2] The director of the city's department of aviation designated the specific pickup and delivery points.

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[1] 29 U.S.C. §§ 201-219 (1964).

[2] In addition to its regular business of transporting airline passengers and personnel, the limousine service also carried intra-company mail for the airlines between their airport and downtown offices, delivered mishandled luggage from the airport to the owner's hotel and, on occasion, carried passengers whose flights had been grounded in Houston to their scheduled destinations or to a point where they could obtain a non-grounded flight.

The franchise required that Hayden provide air conditioned limousines around the clock in sufficient numbers to meet the demand for ground transportation resulting from scheduled incoming and outgoing flights, and that the service be so spaced that under normal conditions no more than one hour would elapse between the arrival of a scheduled aircraft and the arrival of its passengers at the designated points in the city, or between the departure of passengers from any designated point in the city and the departure of the aircraft. Additionally, the franchise directed that the limousines be used exclusively to provide public airport ground transportation services. Fares were also fixed by the franchise.

Section 3(b) of the Fair Labor Standards Act provides:

> "Commerce" means trade, commerce, transportation, or communications among the several States or between any State and any place outside thereof.[3]

Whether an employee is engaged in commerce is determined by practical considerations, not by technical concepts. The test is whether the employee's work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be a part of it, rather than isolated local activi-

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[3] 29 U.S.C. § 203(b) (1964).

ty.[4] It is established in this circuit that the Act is to be given a liberal interpretation.[5]

Hayden contends that the Supreme Court's holding in *United States v. Yellow Cab Co.*[6] dictates the conclusion that the appellees were not engaged in commerce. In *Yellow Cab* the Court declared, after examination of the practical considerations involved, that taxicabs which carried passengers from their hotels, homes, and offices in Chicago to the railroad station, and conversely, were not an integral part of interstate commerce because their relation to interstate transit was too casual and incidental. An analysis of the facts which the Court considered in reaching its result makes it obvious, however, that *Yellow Cab*

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[4]Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 429 (1954).

[5]Mitchell v. Empire Gas Eng'r Co., 256 F.2d 781, 784 (5th Cir. 1958). The broad construction given "commerce" by a growing accumulation of cases has brought within the Act's reach a varied assortment of employees. *See* Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959) (employees of an architectural firm who prepared plans and specifications for air bases and other interstate instrumentalities); Allen v. Atlantic Realty, 384 F.2d 527 (5th Cir. 1967) (building service and maintenance employees of realty company which leased premises to interstate telephone company); Wirtz v. Atlantic States Construction Co., 357 F.2d 442, 447 (5th Cir. 1966) (employees of a construction company building an improvement to a port facility); Wirtz v. B. B. Saxon Company, 365 F.2d 457, 461 (5th Cir. 1966) (employees of an independent company which had contracted to repair vehicles used in operation of an air base); Wirtz v. P & L Equipment Co., 311 F.2d 88 (5th Cir. 1962) (night watchman employed by a company constructing a city street used by trucks carrying mail and other interstate cargo); Public Housing Auth. of B'ham. v. Goldberg, 298 F.2d 365 (5th Cir. 1962) (building service and maintenance employees in building which was leased to federal agencies and in which federal employees produced goods for commerce.

[6]332 U.S. 218 (1947).

does not govern the fact situation presented by the case *sub judice*. The taxicabs in that case did not serve railroad passengers exclusively; quite the contrary, they were required to serve every person within the city. The cabs were under no contractual duties relating to rail movement. Railroad travelers had complete freedom to arrive at or leave the station by cab, trolley, bus, subway, elevated train, private automobile or various other means of conveyance. The present case is hardly analogous. Hayden's limousine service was an important means of ground transportation available to travelers. But of greater significance is the fact that air travel, predominantly interstate, into and out of the Houston International Airport was the very lifeblood of the limousine service and, with few exceptions, the exclusive source of its patronage. The limousine service worked hand-in-glove with the airlines. Coordination of flight schedules with Hayden's operation was vitally important to both enterprises. Hayden's dispatchers would acquire from the airlines the number of passengers who needed transportation from their respective hotels to the airport and then dispatch the proper number of limousines to the hotels. And when a flight schedule was changed, notice of the change was sent to the limousine office. Thus it is clear that the *Yellow Cab* case is no authority for holding that Hayden's limousine operation was only casually or incidentally related to interstate transit. The essential nature of Hayden's business was the transportation of airline passengers to and from the Houston International Airport.[7]

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[7]Hayden testified during the trial as follows:

Q. Isn't the essential nature of your business to get those

Hayden places great reliance upon *Mateo v. Auto Rental Co.*,[8] in which the Ninth Circuit held that employees of Auto Rental, who were engaged in transporting airline passengers between the Honolulu Airport and downtown districts, were not as a practical matter involved in interstate movement. There are, however, important dissimilarities between the facts in that case and the facts in the case before us. Auto Rental did not operate under the strictures of a franchise. The company determined its own pickup and delivery points, was under no obligation to coordinate its activities with flight schedules, and was free to use its limousines for purposes unrelated to airport transportation. And, unlike Hayden's operation, it was engaged in stiff competition with other "airporter" systems. Whether this court would have reached the *Mateo* result on these facts is a question we need not decide. But we have no difficulty in concluding that *Mateo* should not govern the result in the present case.

The facts in this case are not significantly different from those upon which the Fourth Circuit based its finding in *Airlines Transp., Inc. v. Tobin*[9] that a limousine service operating out of the Raleigh-Durham Airport was engaged in commerce. Airline Transportation had contracted with three airlines to provide their passengers with ground transportation between the

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passengers in and out of that airport?

A. And we do.

Q. That's the essential nature of your business?

A. Yes.

[8] 240 F.2d 831 (9th Cir. 1957).

[9] 198 F.2d 249 (4th Cir. 1952).

airport and downtown points designated by the airline companies. The limousines were to be used exclusively in this service. The municipalities of Raleigh and Durham fixed the fares to be charged. In addition to the limousines, commercial transportation to and from the airport was available by bus and taxicab. By their contracts, the airlines had much the same control over limousine operations as did the city of Houston by its franchise. We do not view the absence of comprehensive contractual ties between Hayden and the airlines as a basis for factually distinguishing the two cases because the terms of the franchise sufficiently obligate Hayden to provide the service which was the object of the airlines contracts in *Tobin*.

The result in *Tobin* and the conclusion which we reach in this case are supported by the Supreme Court's decision in *United States v. Capital Transit Co.*[10] Residents of the District of Columbia who worked in government offices in Virginia daily boarded local buses near their homes which took them to a terminal within the District, where they changed to different buses which then took them on to Virginia. The Court held that the passengers' interstate journey to work actually began at the time they boarded the first bus near their homes and ended when they alighted from the bus at their place of employment in Virginia. The Court acknowledged that the interstate trip was broken at the terminal but concluded that, in the "commonly accepted sense of the transportation concept,"

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[10] 325 U.S. 357 (1945).

the entire trip was interstate.[11] Although this case is a pre-*Yellow Cab* decision, the Court has pointed out in a subsequent opinion that *Yellow Cab* does not conflict with the *Capital Transit* case.[12]

Hayden contends further that he was exempt from the requirements of the Act even if the appellees were engaged in commerce, because his limousine service was a local motor bus carrier and, therefore, exempt from the minimum wage and hour requirements.[13] We agree with the Wage and Hour Administrator that

> [t]he indispensable characteristic of a local motor bus carrier is that it is a carrier which serves an integrated commercial or industrial area for the purposes of carrying persons to and from their work in offices and factories, children to and from school daily, and other persons attending to necessary routine business.[14]

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[11]325 U.S. at 363.

[12]United States v. Capital Transit Co., 338 U.S. 286, 290 (1949).

[13]Section 13(a)(9) of the Act, 29 U.S.C. § 213(a)(9) (1964), prior to the 1966 amendments provided:

> The provisions of sections 206 and 207 of this title [relating to minimum wage and hour requirements] shall not apply with respect to—
>
> any employee of a street, suburban or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in section 203(s)(2) of this title.

[14]Wage & Hour Release, March 6, 1944, 1 CCH 1968 Lab. L. Rep. Wages & Hours ¶ 25,266.05, at 38,604. *See* Gillette v. Rockland Coaches, 142 F.2d 616, 618-19 (2d Cir. 1944).

This definition accords with the ordinary and commonly understood meaning of the term "local motor bus carrier." We think it manifest that Hayden's limousine service did not fall within the terms of the definition and, therefore, that it was not exempt from the minimum wage and hour provisions.[15]

Hayden argues, alternatively, that even if the appellees were covered by the Act, the tips which they received in the performance of their duties should be computed in determining their minimum wages. The Act originally made no reference to tips in defining the term "wages."[16] In spite of this, however, the courts construed the statute to permit consideration of tips in computing the amount of minimum wages and overtime compensation.[17] But in each of the cases which have held that tips must be considered, there has existed an agreement between the employer and the employee that tips should be kept by the employee as compensation. We believe the language of these cases implies that in the absence of such an agreement tips should not be considered in computing an employee's minimum wage. The district court found that Hayden

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[15] *See* Wirtz v. Cincinnati, Newport and Covington Transp. Co., 375 F.2d 513 (6th Cir. 1967); and Yogurt Master, Inc. v. Goldberg, 310 F.2d 53, 55 (5th Cir. 1962).

[16] The appellees' claims are based on violations of the Act which occurred during the period from June 21, 1961 to February 12, 1965. The Act was amended in 1966 to permit employers to consider tips in computing wages for purposes of the minimum wage and hour provisions. 29 U.S.C. § 203(m) (Supp. 1966).

[17] Williams v. Jacksonville Terminal Co., 315 U.S. 386, 397 (1942); Moyd v. Atlantic Greyhound Corp., 170 F.2d 302, 303 (4th Cir. 1948); Southern Ry. v. Black, 127 F.2d 280, 284 (4th Cir. 1942). *See also* Annot., 65 A.L.R.2d 974 (1959).

did not have an understanding with his employees that tips would be a part of their compensation and we reject Hayden's contention that this finding is clearly erroneous.[18]

Finally, Hayden contends that the court's award of attorney's fees to the appellees' counsel should have been made conditional upon counsel's surrender of all rights to additional compensation which might exist under a contingent-fee contract with the appellees. We need not reach this contention. The contractual arrangements between employees and their counsel are their concern and the employer has no standing to seek the disruption of those arrangements.[19] The appellees, apparently satisfied with their counsel's representation to the district court that he would credit the award to the contingent-fee amount, express no disenchantment with the court's award and, therefore, we see no reason to tamper with it.

We have considered all of the contentions urged by the appellant and find them without merit.

AFFIRMED.

11 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

A. G. BOWEN, ET AL	)	
	)	
VS.	)	C.A. 63-H-366
	)	
FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE	)	

MEMORANDUM OPINION.

Filed Sept. 28, 1967.

(Title Omitted.)

This is a suit for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act of 1938, as amended, Title 29, Section 201, et seq., U.S.C.A.

Plaintiffs, former employees of the defendant, are residents and citizens of Houston, Harris County, Texas and the defendant, Fred G. Hayden, is the sole proprietor of the Houston International Airport Limousine Service, with an office at 1702 Lamar Street, Houston, Texas.

Plaintiffs' cause of action for reinstatement and reimbursement for lost wages resulting from their alleged unlawful discharge has been severed from this

suit involving unpaid minimum wages and overtime compensation.

The primary question is whether the defendant and his employees were engaged in commerce as contemplated by the Act. Further, the defendant maintains that even if his operations are covered by the Act, he is exempt from the minimum wage and overtime compensation provisions of the Act because he is engaged in the business of operating taxicabs (29 U.S.C.A. 213(a)(12)) or because he is a local motorbus carrier. (29 U.S.C.A. 213(a)(9).)

The defendant employed the following plaintiffs as limousine drivers, checkers, starters, and dispatchers at certain times during the period from June 20, 1961, to February 12, 1965:

A. G. Bowen, Howard V. Brown, Frank Couell, Everett Dennis, J. P. Dunn, Bennie Horowitz, Clyde Hollinger, Arthur J. Laird, G. E. Pippin, L. A. Reid, Wayne R. Snyder, James K. Zimmerman, Joseph Leger, Richard Moore, H. I. Dobbs, David O. Carter, Seaborn Fuller, James H. Gray, James K. Grote, J. E. Hollis, C. T. Moore, W. E. Taylor and W. L. Taylor.

Those plaintiffs employed as drivers by the defendant had as their primary duty the driving of the airport limousines between the Houston International Airport and various specified pickup locations in the City of Houston.

Plaintiffs employed by the defendant as starters were stationed at the Houston International Airport

and their primary duty was to direct the loading of defendant's limousines with passengers who had arrived at the Houston International Airport via airplane from points within and without the State of Texas. When a limousine was loaded, the starter would dispatch them to one or more of the specified pickup locations in the City.

The duty of a dispatcher at defendant's downtown office was primarily to correlate the various calls for limousine service to meet outgoing airplane flights and dispatching the limousines to the specified pick-up locations in the City. There, the passengers were picked up at times scheduled to properly coincide with the airplane flights from the airport destined for points within and without the State of Texas.

Within the period from June 30, 1961, to February 12, 1965, plaintiffs who were employed by the defendant as drivers, received as their only compensation from defendant an hourly wage rate of $1.00 per hour; that during said period the Plaintiffs who were employed as checkers received as their only compensation from defendant an hourly wage rate of $1.10 per hour; that during said period the plaintiffs who were employed by the defendant as starters received as their only compensation from the defendant an hourly wage rate of $1.44 per hour; and, during said period the plaintiffs who were employed as dispatchers received as their only compensation from defendant an hourly wage rate of $1.44 per hour.

Further, it is obvious and clear to this Court that the drivers, checkers, starters and dispatchers were

not compensated at a rate of one and one-half times their hourly rate for the hours they worked in excess of forty (40) hours a work week.

Although the testimony was conflicting, the defendant did not, as he contends, have an explicit or implicit understanding with any of the plaintiffs that the tips that each of the plaintiffs collected in the course of his employment were to be considered as part of his wages nor did any agreement exist between the defendant and the plaintiffs that tips should be kept by the plaintiffs as compensation for their services. Indeed, under the terms of the 1962 Ordinance (62-497(5)(k) granting the franchise it is expressly provided that the tipping of drivers by air traveling passengers will not be fostered or encouraged by the defendant. Not every gratuity given a worker in the course of his employment should be considered a part of his wage. Whether tips should be considered as part of an employee's wages should be governed by the circumstances. Williams, et al. v. Jacksonville Terminal Company, 315 U.S. 386, 397, 398, 62 Sup. Ct. 659, 669, 670, 86 L. Ed. 914 (1942). In the present case, the drivers, checkers, dispatchers and starters were paid a salary, the adequacy of which is a question at issue here. Therefore, under the employment arrangement at hand, tips should not be considered as part of the plaintiffs' wages. Lloyd v. Parziale, 23 C.C.H. Lab. Cas. 67537 (N.Y. C.Ct. 1952), affd. 203 Misc. 399, 119 N.Y.S. 2d 62; see A.L.R. 2d 968.

During the period for which unpaid wages and overtime conpensation are sought, defendant, d/b/a Houston International Airport Limousine Service.

was engaged in the business of transporting airline passengers, airline personnel, luggage, and airline company mail from the airport to various specified pickup locations in the city and from such locations to the airport.

Upon the basis of competitive bidding, defendant was granted two separate franchises from the City of Houston which took the form of two city ordinances. The first (No. 57602) was in effect from June, 1961, to June, 1962; the second (No. 62-477) was in effect for the remainder of the relevant period.

No other person or firm was franchised or authorized by the city to operate such a transportation service and none in fact existed during the relevant period. The two franchises provided explicitly that they were granted by the city to provide a means of ground transportation for persons using the airport. This was to the end that such persons with their baggage could reasonably be assured of getting from the airport to points within the city and vice-versa with minimum difficulty and inconvenience and at a fair and reasonable rate.

The right and privilege granted by the city to defendant was interpreted by the applicable ordinances to mean only the scheduled ground transportation service designed to accommodate passengers arriving and departing by scheduled air transportation service at Houston International Airport.

Both franchises provided that the service contemplated would require defendant to provide sufficient

vehicles of certain specified type to meet the demand for schedules of ground transportation twenty-four (24) hours a day, seven (7) days a week for all incoming and outgoing flights of the airlines serving the airport.

Section 5(i) of the 1962 franchise specified that the schedules of service of defendant's limousines would be spaced so that under normal conditions no more than one hour should elapse between an arrival of a schedule aircraft at the airport and the delivery of its passengers at the various specified pickup points in the city or between the departure of passengers from the various specified pickup points in the city and the departure of the aircraft from the airport.

In addition the franchise granted to the defendant such privileges at the airport as parking space and the right to make announcements over the public address system.

To comply with the franchise and ordinance requirements, the defendant scheduled the departure of its limousines from the airport and from the pickup points in the city so as to complement and coordinate with the arrival and departure times of flights of scheduled airlines. Defendant obtained continual information on the airlines' arrival and departure schedules, and, when the need arose, adjusted its own limousine schedules to conform with any changes in airline schedules, thereby providing continuing coordination between the airline schedules and defendant's operations.

The specified pickup points in the city were designated by the City Aviation Director: These pickup points, located approximately eleven miles from the airport, were in three general areas: the downtown area, the uptown area, and the South Main area. Drivers of the defendant's limousines were given suggested routes from the airport to the downtown or uptown areas, which they normally followed, but the drivers were allowed to, and they did, depart from the suggested routes in the case of traffic congestion or other conditions which made it desirable to do so in the driver's opinion. Defendant's limousines did not, however, deviate from their suggested routes for the purpose of dropping off a passenger at his individual destination. Defendant provided transportation only between the airport and the specified pickup points. While following the normal routes to service the pickup points in a given area, the limousines did not stop at pickup points unless scheduled to pick up a passenger.

In addition to the synchronized schedules of the defendant and the airlines, the defendant's operations were further harmonized with the airlines by the practice of defendant's dispatchers calling the airlines to determine if any of the airline passengers needed to be picked up by the defendant. Conversely, the airlines notified the defendant when their scheduled arrival and departures were delayed, and a majority of the reservations on the limousines were made by the airlines calling the defendant's dispatcher's office.

Airline personnel were charged a reduced rate of 75c per trip for the transportation of flight crews to

and from the airport. This reduced rate was specified in the 1962 franchise. All airlines made use of defendant's limousines. Three airlines made special arrangements with defendant for the exclusive use of a limousine to transport their crews at the rate of $7.50 per trip.

In the course of its regular operations, the defendant also carried company mail for various airlines operating out of the airport for remuneration. This mail was delivered to and picked up from the airlines' downtown and airport offices. A large portion of this mail was received from and destined to their offices outside the State of Texas and transported by the airlines' scheduled interstate flights.

The defendant transported luggage or other baggage for the airlines between their airport offices and downtown offices. When the airlines mishandled the luggage of their passengers, and subsequently located such luggage, airline personnel would deliver the luggage to the defendant's limousine starter at the airport. Defendant would then transport said luggage to a hotel at a charge for each individual service which was paid by the airline. A charge slip would be issued to defendant's starter on such occasions and the charge would be billed the airlines on a monthly basis.

During the relevant period, the defendant, as part of his service, would transport both interstate and intrastate passengers whose flights had been grounded in Houston because of weather or other conditions to their schedule destinations or to another point where

they could get a flight out of an airport that was not fogged in or grounded. The airline whose flight was grounded would make arrangements with the defendant for the transportation of their stranded passengers to points outside Houston. Passengers continued interstate journeys under such arrangements to Austin, Lufkin, San Antonio, College Station, and other Texas Cities. Also on two occasions the defendant provided transportation for passengers whose flights were interrupted in Houston to points in Louisiana.

The drivers who transported company mail, misplaced luggage, or transported passengers outside of the City of Houston were compensated at the same rate as drivers transporting passengers to and from the airport to the downtown areas; and the duties of each of the individuals involved in performing these services were combined in defendant's operation.

The terms of the 1962 franchise provided that the automobile equipment used by the defendant shall be used exclusively to provide public ground transportation service at the Houston International Airport, and such automobile equipment, personnel and service shall not be utilized for any other purpose without prior approval of the City Council.

During the relevant period, the defendant was engaged in no other business than transporting airline passengers, packages, airline mail, and luggage. The defendant, however, in certain isolated instances, would rent its limousines for private purposes such as weddings; these instances constituted but a small

part of the revenue of the defendant's limousine service.

The plaintiffs, employees of Fred G. Hayden, d/b/a Houston International Airport Limousine Service, were engaged in commerce within the meaning of the Act during the relevant period. Defendant's limousines were used exclusively for transporting airline passengers to and from the Houston International Airport and points located in downtown or uptown Houston, an approximate distance of eleven miles. The airport was not serviced by any public transportation system during the period in question; the nearest public bus stop being located about one and one-half miles from the terminal entrance.

In each year of the relevant period, the defendant transported over 200,000 passengers to and from the airport, and a substantial majority arrived at the airport from points outside the State of Texas or departed for points outside the State of Texas.

In view of the defendant's relation with the various airlines, the necessities and circumstances in providing interstate airline passengers with transportation to and from the airport, the interstate movement began when the passenger entered defendant's limousine to be carried to the airport, and conversely, when he was carried from the airport to a previously designated stopping point. It is clear then, that during the period in question, the defendant's operations were an integral part of the incoming and outgoing interstate airline traffic of the City of Houston. Airline Transportation, Inc. v. Tobin, 198 F. 2d 249, 251

(4th Cir. 1952); see Mitchell v. Lublin, 358, U.S. 207 (1959) McLeod v. Threlheld, 319 U.S. 491 (1943); U.S. vs. Capitol Transit Co., 325 U.S. (1944); Caserta v. Home Lines Agency, Inc. 273 F. 2d 943, 945, 946 (2nd Cir. 1959).

Not only were defendant and the plaintiffs-employees engaged in commerce within the meaning of the Act, but the defendant has failed to prove that he was operating as a local motorbus carrier within the meaning of the Section 13(a)(9) exemption. The defendant contends that if plaintiffs are employees engaged in commerce, defendant is exempt from the minimum wage and overtime compensation requirement because his limousine service is a local motorbus carrier.

The defendant used in his operation Cadillac Limousines with a maximum seating capacity of seven (7) which were licensed as automobiles, and an eleven (11) passenger limousine called an "Aerobus", manufactured by the Checker Company. The Cadillac and Aerobus limousines had adequate luggage and trunk space to accommodate a full load of passengers and had no aisles to accommodate standers.

Although defendant's limousines were only allowed to make stops at those hotels and motels in the downtown and uptown areas designated by the City of Houston Aviation Director, defendant's limousines were not required to follow a fixed route and did not stop at designated "stops" spaced a given number of feet along the city streets in order to effectively serve the populace at large as do local

motorbuses. In further contra-distinction, defendant charged a standard rate for his services; $1.50 for adults and 75% for children and airline personnel; whereas the fares charged by Rapid Transit, a local motorbus franchised by the city, varied from zone to zone and did not exceed 33c during the relevant period.

Because defendant's operations were limited by franchise solely to the transportation of passengers and luggage to and from the airport and because defendant was required by said franchise to coordinate with airline schedules and to limit his operations to various specified pickup points located in the City of Houston, defendant's limousine service was not intended to and did not render daily common carrier passenger service as a part of the transportation system of the locality. The specialized transportation provided by the defendant, integrated as it was with the interstate commercial airline schedules, lack the necessary indicia of a local motorbus carrier as enumerated in Gillette v. Rockland Coaches, Inc., 142 F. 2d 616, 619, 620 n.1 (2nd Cir. 1944).

Furthermore, it cannot be said that the defendant is exempt from the Act because he was engaged in the business of operating taxicabs within the meaning of 29 U.S.C.A. 13(a)(12). Defendant's transportation service was not available to the public as to time or destination in order to serve the customer's personal convenience. Defendant's limousine drivers were not free to organize their own time nor to exercise initiative to secure necessary patronage. Defendant's limousines were used for the sole purpose

of providing ground transportation to and from the airport and were not available as a part of the general transportation system of the community. The limousine service was available to the general public only for traveling to and from the airport in coordination with the airline flight schedules. The limousines were unmetered, did not have vacancy signs, and did not advertise as taxicabs; they did not stand and wait for passengers, except at the airport, where they awaited the arrival of airline flights. The number of drivers on duty at any given time was determined by defendant in advance by using schedules of arrival and departure of scheduled flights of airlines. Thus defendant's operation also lack the necessary indicia to render him exempt from the Act under the taxicab exemption. Airlines Transportation, Inc. vs. Tobin, supra; Wirtz v. Cincinnati, Newport and Covington Transportation Co., 375 F. 2d 513 (6th Cir. 1967).

Exemptions under the Act are to be narrowly construed and the defendant has failed to sustain the burden of proving that his operations and his employees were exempt from the minimum wage and overtime compensation of the Act, 29 U.S.C.A. 206, 207; see Arnold vs. Ben Kanowsky, Inc., 361 U.S. 388, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960); Airlines Transportation, Inc. v. Tobin, supra.

The defendant has failed to comply with Sections 206 and 207 of the Fair Labor Standards Act of 1938, as amended, Title 29, and the plaintiffs are entitled to unpaid minimum wages and overtime compensation during the relevant period.

The defendant did not keep records of the hours worked each work day and the total hours worked each week for any of the plaintiffs, nor did he keep any records of the daily or weekly total earnings or wages. The only records kept by the defendant reflect total wages paid each plaintiff for a bi-weekly period.

In failing to make, keep and preserve accurate records of the number of hours worked by the plaintiffs each work week, defendant violated Sections 211 (c) and 215(a)(5) of the Act, and cannot be heard to complain that the plaintiffs' claims under the Act are based upon evidence that is too uncertain or imprecise. Anderson vs. Mt. Clemons Pottery, 328 U.S. 680 (1945); Mitchell v. Mitchell Truck Line, Inc., 286 F. 2d 721 (5th Cir. 1961).

Plaintiffs have performed work for which they were improperly compensated. A just and reasonable inference based upon the evidence produced by plaintiffs from the available records of the defendant can and must be drawn to determine the amount which the various plaintiffs are entitled to recover. Counsel has suggested that in the event the employee-plaintiffs are covered by the Act and liability attaches that the Court may relieve itself of the mathematical computation by affording counsel two (2) weeks in which to present to the Court an agreed statement of individual recovery. If such agreed figures cannot be submitted by the parties within two weeks from this date, both parties are granted leave to submit their proposed calculations which they believe the Court should accept in accordance with the appli-

cable rules of law. In this event, the Court will then make its own calculations in a supplemental memorandum.

The defendant has shown to the satisfaction of the Court that he was in good faith and had reasonable grounds for believing that his acts or omissions were not a violation of the Act. Under these facts, the Court will not award any liquidated damages.

In support of their claim for reasonable attorneys' fees as provided by the Act, plaintiffs' attorneys showed that they spent 247 hours in pretrial preparation over a period of approximately three and one-half years. Plaintiffs' attorneys diligently represented their twenty-three clients in drafting pleadings and interrogatories, attending depositions, preparing briefs, etc., in numerous pretrial proceedings; and, in the three day trial of the case. The plaintiffs contend that the sum of $8,500.00 would be a reasonable and proper amount for attorneys' fees. Defendants contend that plaintiffs' attorneys were employed under a contingent fee contract entitling them to one-third of the amount recovered for the plaintiffs, and, further, that the plaintiffs' attorneys were not contractually obligated to reimburse plaintiffs from any attorney fees awarded by the Court. Plaintiffs' lead counsel, however, testified that he will credit any attorneys fees awarded by the Court to the contingent fee amount.

In considering the time spent by counsel, counsel's ability, the nature of the case, the expenses necessarily incurred and the character of the efforts

required, plaintiffs are entitled to recover the sum of $4,500.00 as reasonable attorneys' fees.

This memorandum opinion constitutes the findings of fact and conclusions of law of this Court. The clerk will send copies of this memorandum to all counsel.

Dated at Houston, Texas, this 28th day of September, 1967.

WOODROW SEALS,
United States District Judge.

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NO. 1201

IN THE

Supreme Court of the United States

October Term, 1968

FRED G. HAYDEN, d/b/a HOUSTON INTERNATIONAL AIRPORT LIMOUSINE SERVICE, *Petitioner*

v.

A. G. BOWEN, ET AL, *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

I.

QUESTIONS PRESENTED

Where the employees of an airport limousine service, whose essential nature was the transportation of airline passengers in coordination with interstate flight schedules, pursuant to the requirements of a franchise, engaged "in commerce" for purposes of the Fair Labor Standards Act.

II.

STATEMENT OF THE CASE

Due to its inclusion of facts rejected by the courts below and its omission of a number of controlling facts, Respondents rely upon the Statement of the Case set out in detail in both the District Court and the Court of Appeals Opinions.

III.

REASONS FOR DENYING THE WRIT

(A.) The Decision Below Is In Accord With The Decisions Of This Court.

After reviewing the nature of the Petitioner's airport limousine service and finding the essential nature of Petitioner's business was to provide an integrated service with airlines which move passengers into and out of interstate flights, the Court of Appeals correctly decided that the instant case was governed by *United States v. Capital Transit Co.*, 325 U.S. 357 (1945). In the second *Capital Transit* case, *United States v. Capital Transit Co.*, 338 U.S. 286, 290 (1949), this Court held that its decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) did not conflict with its prior holding that Capital Transit's transportation was a part of a continuous stream of interstate transportation. The second *Capital Transit* case, supra, held that Capital Transit's sale of its bus line in Virginia did not affect the fact that Capital Transit's intra-district streetcar and bus transportation of passengers going to and from the Virginia destination was an integral part of an interstate movement. The fact that part of an interstate journey of persons moving from a point of origin

in one state to a point of destination in another consists of transportation by an independent agency solely within the bounds of one state does not make that portion of the trip intrastate.

The Court of Appeals properly characterized the operation of the taxicabs in *Yellow Cab,* supra, as being only incidental to the transportation of interstate passengers since the transportation of the railroad passengers by Yellow Cab was intermingled with the admittedly local operations of the Chicago taxicabs. In fact, by ordinance the Chicago taxicab service was confined to transportation between any two points within the corporate limits of the city, and none of them served only railroad passengers, all of them being required to serve every person within the limits of Chicago. Contrast this to Petitioner's operation where his service was restricted between the Houston International Airport and points designated by the City Aviation Director and confined by franchise to transporting only airline passengers arriving at or departing from the Houston International Airport. As the Court of Appeals decision points out, it was the air travel, predominantly interstate into and out of the Houston International Airport, which was the very lifeblood of the limousine service and, with few exceptions, the exclusive source of its patronage. This Court went to great lengths to point out the limited holding it intended in *Yellow Cab*:

> "All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." 332 U.S. at p. 231.

Moreover, the operation of a taxicab servicing railroad passengers is not analogous to the service of an airline limousine servicing airline passengers. An airport serving a densely populated area, such as the Houston International Airport, by necessity will be located some distance from the downtown area. The lower courts found that the Houston International Airport was located eleven miles from the downtown Houston area where Petitioner serviced various pickup points. (R. 406, 404 Fed.2d at 683). In contrast, both railroad stations serving the City of Houston are located in the downtown area. The commonly accepted sense of the transportation concept may well dictate that an interstate railroad passenger begins his interstate journey when he arrives at the railroad station located in the downtown area, but that the interstate journey of an airline passenger begins at the time he boards a limousine which coordinates with airline schedules. Such was the reasoning of the Fourth Circuit in *Airlines Transportation, Inc. v. Tobin,* 193 F.2d 249, 251 (4th Cir. 1952).

(B.) The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals Nor Is There A Conflict Among The Other Courts Of Appeals On The Issue Of Coverage Under The Fair Labor Standards Act.

The definition of "commerce" in Section 3(b) of the Fair Labor Standards Act is to be given meaning by practical considerations, not by technical conceptions. The test is whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it. *Mitchell v. Vollmer,* 349 U.S. 427 (1954); *Mitchell v.*

Empire Gas Engineering Co., 256 F.2d 781 (5th Cir. 1958).

This being so, Petitioner's claim that this case involves a conflict between the circuits will be seen to be really a claim that largely factual determinations were decided below in a somewhat different manner than the decisions in other cases. However, the opinion of the Court of Appeals plainly and persuasively identifies the essential factual differences between this case and some of the others relied upon.

The Court of Appeals found that the facts in this case were not significantly different from those upon which the Fourth Circuit based its findings in *Airlines Transportation, Inc. v. Tobin,* supra, and further found that important dissimilarities existed between the facts in this case and the facts of *Mateo v. Auto Rental Co.*, 240 F.2d 831 (9th Cir. 1957).

Mateo, supra, correctly held that the issue of coverage under the Fair Labor Standards Act is a factual one and the decision must rest on the particular facts of each case. 240 F.2d at 833.

(C.) The Issue Presented Is Not Of Public Importance.

The period of time for which minimum wages and overtime were sought in the instant case covered the period from June 20, 1961 to February 12, 1965. In 1966 coverage under the Fair Labor Standard Act was expanded to include coverage of employees employed in an enterprise engaged in commerce or the production of goods for commerce. 29 U.S.C.A. 203s; 29 U.S.C.A. 206 and 207.

A worker employed by an enterprise covered by the Fair Labor Standards Act comes within the purview of the statute regardless of whether his particular activities have any relation to interstate or foreign commerce. He is entitled to all the statutory benefits merely because of the covered status of his employer. As of February 1, 1969, an enterprise engaged in commerce is an enterprise whose annual gross volume of sales made or business done is not less than $250,000.00. 29 U.S.C.A. 203. Even during the covered period, Petitioner exceeded this gross amount since he transported over 200,000 passengers to and from the airport, charging *$1.50* for each trip. (Memorandum Opinion of the District Court, R. 409; R. 429).

It is respectfully submitted that the issue here presented is moot for most airport limousine services serving a metropolitan airport since they will have gross revenues in excess of $250,000.00.

In addition to transporting airline passengers to and from the Houston International Airport, Petitioner also, on a regular and recurrent basis, hauled interstate airline mail, hauled airline flight crews to and from the airport by special arrangements with interstate carriers, handled baggage of interstate passengers, and hauled interstate passengers whose interstate trips had been interrupted at the Houston International Airport to points outside the City of Houston (Memorandum Opinion of the District Court, R. 406-408). The involvement of Petitioner's employees in these activities now clearly brings him within the purview of the Fair Labor Standards Act under the enterprise coverage test, if he was not otherwise covered.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari to review the judgment of the court below should be denied.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned counsel for Respondents, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing petition has been served upon Petitioner by personally delivering a copy thereof to Robert L. Burns, attorney of record for Petitioner, 1811 C & I Building, Houston, Texas, on this _____ day of May, 1969.

_____
Chris Dixie